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Law and Justice Interim Committee

66th Montana Legislature

Memorandum

To: Law and Justice Interim Committee
From: Julianne Burkhardt
Date: November 5, 2019
Re: Criminal Justice Process Following Conviction and Methods of Obtaining Postconviction Relief

I. Introduction

The primary ways for a person to be convicted of a felony are a guilty plea or a verdict of guilty following a trial. Guilty pleas are addressed in §46-16-105, MCA. The conduct of a criminal jury trial is addressed in §46-16-401, *et seq.* Following conviction, offenders proceed to the sentencing phase. A brief summary of the sentencing process is provided below.

Following sentencing, an offender has several avenues to apply for postconviction relief. These avenues include, a direct appeal, an application to the sentence review division, a petition for postconviction relief, an application for a writ of habeas corpus, parole, and an application for executive clemency. Each of the methods of obtaining postconviction relief are discussed below.

II. Sentencing

The sentence and judgment phase of a criminal case is addressed in Title 46, chapter 18, MCA. The correctional and sentencing policy of the state of Montana is found in §46-18-101:

> **46-18-101. Correctional and sentencing policy.** (1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.
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> (2) The correctional and sentencing policy of the state of Montana is to:
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> (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;
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> (b) protect the public, reduce crime, and increase the public sense of

safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

(3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles:

(a) Sentencing and punishment must be certain, timely, consistent, and understandable.

(b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.

(c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.

(d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.

(e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.

(f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.

(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.

(h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of assigned counsel, as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment.

(i) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

Following conviction of a felony, the district court orders a presentence investigation. *See* §46-18-111, MCA. The presentence investigation report contains the following information:

46-18-112. Content of presentence investigation report. (1) Whenever an investigation is requested by the court, the probation and parole officer shall promptly inquire into and report upon:

(a) the defendant's characteristics, circumstances, needs, and potentialities, as reflected in a validated risk and needs assessment;

(b) the defendant's criminal record and social history;

(c) the circumstances of the offense;

(d) the time of the defendant's detention for the offenses charged;

(e) the harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community; and

(f) the victim's pecuniary loss, if any. The officer shall make a reasonable effort to confer with the victim to ascertain whether the victim has sustained a pecuniary loss. If the victim is not available or declines to confer, the officer shall record that information in the report.

(2) The following information pertaining to the defendant may also be included or considered in the report:

(a) prior criminal history;

(b) probation or parole history;

(c) official version of the offense or offenses;

(d) custody status;

(e) pending cases or charges against the defendant;

(f) probation officer recommendations;

(g) gang affiliation;

(h) background and ties to the community;

(i) history of substance use disorder;

(j) physical and mental health;

(k) employment history and status;

(l) education history; and

(m) prescreening and placement options.

(3) All local and state mental and correctional institutions, courts, and law enforcement agencies shall furnish, upon request of the officer preparing a presentence investigation, the defendant's criminal record and other relevant information.

(4) The court may, in its discretion, require that the presentence investigation report include a physical and mental examination of the defendant.

(5) Upon sentencing, the court shall forward to the sheriff all information contained in the presentence investigation report concerning the physical and mental health of the defendant, and the information must be delivered with the defendant as required in 46-19-101.

As described in §46-18-112, MCA, once a person is convicted, the Montana Rules of Evidence and other statutes which limit the information, testimony, and evidence a jury is allowed to consider no longer apply. For example, the criminal history of the accused is generally not a part of the criminal trial. However, once a person is convicted the Montana Rules of Evidence, which typically keep that information away from the jury, no longer apply and a defendant's criminal history often has a large impact on the sentence ordered by the district court. Additionally, even if the offender does not have a criminal history, information regarding the offender's social history or reputation in the community can be considered at sentencing.

III. Options for Postconviction Relief

A. Appeal -- An appeal may be filed by a defendant within 60 days of the date of the sentence and judgment. The scope of the appeal is governed by §46-20-104, MCA:

> **46-20-104. Scope of appeal by defendant.** (1) An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.
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> (2) Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).

A defendant may also obtain a stay of execution of a sentence while the appeal is pending. For example, a defendant who is sentenced to a term of incarceration in the Montana State Prison may request bail pending appeal and if bail is granted the sentence of imprisonment must be stayed. *See* §46-20-204, MCA.

Generally speaking, the state may not appeal the final judgment of the court after a conviction. However, there are exceptions to this general rule found in §46-20-103, MCA:

> **46-20-103. Scope of appeal by state.** (1) Except as otherwise specifically authorized, the state may not appeal in a criminal case.
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> (2) The state may appeal from any court order or judgment the substantive effect of which results in:
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> (a) dismissing a case;
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> (b) modifying or changing the verdict as provided in 46-16-702(3)(c);
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> (c) granting a new trial;
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> (d) quashing an arrest or search warrant;
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> (e) suppressing evidence;
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> (f) suppressing a confession or admission;
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> (g) granting or denying change of venue; or
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> (h) imposing a sentence that is contrary to law.

B. Application to Sentence Review Division -- Another option available to offenders following conviction is an application to the Sentence Review Division of the Montana Supreme Court. The Sentence Review Division is composed of three district court judges appointed by the chief justice of the Montana Supreme Court. *See* §46-18-901, MCA. The Sentence Review Division considers the appropriateness of the sentence and may review all documents connected with the conviction and sentence. The Sentence Review Division has broad powers to decrease or increase a sentence. *See* §46-18-904, MCA. An offender may file an application with the Sentence Review Division if sentenced to a term of 1 year or more in the state prison or to the custody of the Department of Corrections. *See* §46-18-903, MCA. The

decision of the Sentence Review Division is final. Thus, there is no direct right of appeal from a decision of the Sentence Review Division. *See* §46-18-905, MCA.

C. Petition for Postconviction Relief -- Another avenue for potential relief for an offender who has no adequate remedy of appeal is a petition for postconviction relief as provided in §46-21-101, MCA:

> **46-21-101. When validity of sentence may be challenged.** (1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.
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> (2) If the sentence was imposed by a justice's, municipal, or city court, the petition may not be filed unless the petitioner has exhausted all appeal remedies provided by law. The petition must be filed with the district court in the county where the lower court is located.

A petition for postconviction relief may be filed within 1 year from the date when the conviction becomes final. In general terms, a conviction is final for purposes of postconviction relief when the defendant's appeal rights have expired. If exculpatory evidence is discovered at any time during the sentence the defendant has 1 year from the date the conviction becomes final or the date the defendant knew or should have known of the new evidence to file a petition for postconviction relief. *See* §46-21-102, MCA. A common claim seen in petitions for postconviction relief is a claim of ineffective assistance of counsel. Finally, both the petitioner and the prosecution have a right of appeal to the Montana Supreme Court from a final decision regarding a petition for postconviction relief. The notice of appeal must be filed within 60 days of entry of an order on the petition for postconviction relief. *See* 46-21-203, MCA. §46-21-102 details the situations when a defendant may file a petition for postconviction relief:

> **46-21-102. When petition may be filed.** (1) Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter:
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> (a) when the time for appeal to the Montana supreme court expires;
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> (b) if an appeal is taken to the Montana supreme court, when the time for petitioning the United States supreme court for review expires; or
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> (c) if review is sought in the United States supreme court, on the date that

that court issues its final order in the case.

(2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

Please note that subsection (2) of 46-21-101, MCA, contains the current statutory language regarding petitions for postconviction relief based on newly discovered evidence.

An important aspect of a petition for postconviction relief is the opportunity to petition for DNA testing. Of course, the results of DNA testing may support an application for postconviction relief based upon newly discovered evidence. The procedure and requirements for filing a petition for DNA testing are found in 46-21-110, MCA:

46-21-110. Petition for DNA testing. (1) A person convicted of a felony may file a written petition for performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be verified by the petitioner under penalty of perjury and must:

(a) explain why the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(b) present a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) explain, in light of all the evidence, how the requested testing would establish the petitioner's innocence of the felony;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought;

(e) reveal the results of any DNA or other known biological testing that was previously conducted by the prosecution or defense; and

(f) state whether a petition was previously filed under this section and the results of the proceeding.

(2) If the petition does not contain the information required in subsection (1), the court shall return the petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing information.

(3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the attorney general, the county attorney of the county of

conviction, and, if known, the laboratory or government agency holding the evidence sought to be tested. The court shall order that any responses to the petition must be filed within a reasonable time after the date of service under this subsection.

(4) The court may order a hearing on the petition. The hearing must be before the judge who conducted the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether or not it was introduced at the trial.

(5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that:

(a) the evidence sought to be tested is available and has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(b) the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(c) the petitioner has made a showing that the evidence sought to be tested has a reasonable probability, assuming favorable results, of being material to the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction;

(d) in light of all the evidence, there is a reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution; and

(e) the evidence sought to be tested was not previously tested or was tested previously but another test would provide results that are reasonably more discriminating and probative on the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction or would have a reasonable probability of contradicting the prior test results.

(6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must be conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney of the county of conviction. If the parties cannot agree on a laboratory, the court shall direct a laboratory of the court's choice to conduct the testing. At the request of the attorney general or the county attorney of the county of conviction, the court shall order the evidence submitted to an additional laboratory designated by the requester for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties' interests in the integrity of the evidence and the testing process.

(7) After a petition has been filed under this section, the court may order:

(a) the state to locate and provide the petitioner with any documents, notes, logs, or reports relating to physical evidence collected in connection with the case or otherwise assist the petitioner in locating biological evidence that the state contends has been lost or destroyed;

(b) the state to take reasonable measures to locate biological evidence that may be in its custody;

(c) the state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital or laboratory or other facility; and

(d) the production of original documents from the laboratory showing the results of any analysis conducted on any items or biological material collected as evidence from the time the evidence was received to the time of disposition. This includes but is not limited to the underlying data and laboratory notes prepared in connection with DNA tests, presumptive tests for the presence of biological material, serological tests, and analysis for trace evidence. All items from the requested case file must be made available to the petitioner, including digital files and photographs.

(8) The provisions of subsection (7) do not limit a court from ordering the production of any other relevant evidence.

(9) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court shall order a laboratory, if located in this state, to give the testing priority over any other pending casework of the laboratory.

(10) The test results must be fully disclosed to the parties.

(11) If the test results are inconclusive, the court may order further appropriate testing or terminate the proceeding. If the test results inculpate the petitioner, the court shall:

(a) notify the board of pardons and parole;

(b) order the petitioner's test sample to be included in the DNA identification index established under 44-6-102 and the federal combined DNA index system (CODIS) offender database;

(c) notify any victim and the family of the victim that the test results were not favorable to the petitioner; and

(d) terminate the proceeding.

(12) If the test results are favorable to the petitioner, the court shall order a hearing to determine whether there is a reasonable probability that a different outcome at trial could have been reached and after the hearing shall make appropriate orders to serve the interests of justice, including an order that:

(a) vacates and sets aside the judgment;

(b) discharges the defendant if the defendant is in custody; or

(c) resentences the defendant.

(13) The court may order a DNA profile to be submitted to the DNA identification index established under 44-6-102 and the federal combined DNA index system (CODIS) offender database to determine whether it matches a DNA profile of a known individual or a DNA profile from an unsolved crime. The DNA profile may be obtained from probative biological material from crime scene evidence.

(14) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional testing requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

(15) The remedy provided by this section is in addition to any remedy available under part 1 of this chapter.

(16) When a motion is filed to vacate a conviction based on DNA results that are favorable to the petitioner, the state may provide victim services to the victim of the crime that is being reinvestigated during the reinvestigation, during the court proceedings, and, upon consultation with the victim or a victim advocate, after final adjudication of the case.

D. Application for Writ of Habeas Corpus -- An application for writ of habeas corpus is a type of postconviction relief under 46-21-101, MCA. A defendant may file a petition for a writ of habeas corpus at any time following exhaustion of appeal rights.

46-22-101. Applicability of writ of habeas corpus. (1) Except as provided in subsection (2), every person imprisoned or otherwise restrained of liberty within this state may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.

(2) The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal. The relief under this chapter is not available to attack the legality of an order revoking a suspended or deferred sentence.

The focus of the writ of habeas corpus is whether the person is being imprisoned illegally. However, a person may not be released unless the person's substantial rights are affected. *See* §46-22-102, MCA. A habeas corpus petition may also be filed in federal court. However, all state options must be exhausted before filing in federal court.

E. Parole -- Unless an offender is sentenced to death or a life sentence without possibility of release, the offender will become eligible for parole generally when 25 percent of the custodial portion of the sentence has been served. Becoming eligible for parole does not necessarily translate into the granting of parole. The statutes governing the Board of Pardons and Parole and providing parole requirements for offenders are found in Title 46, chapter 23, parts 1 and 2.

F. Executive Clemency -- Another method of obtaining postconviction relief is an application for executive clemency. All offenders may apply for executive clemency; however, specific rules exist for applications by offenders who are sentenced to death. An offender with

any sentence other than death may apply for clemency before the exhaustion of judicial and administrative remedies. Applications for executive clemency are made to the Board of Pardons and Parole.

In 2015 the Montana Legislature amended the clemency statutes -- specifically 46-23-301, MCA -- so the governor has final decision making power regarding whether the Board of Pardons and Parole conducts an investigation and holds a hearing regarding an application for clemency and following a hearing whether clemency is grated.

IV. Conclusion -- Following sentencing, felony offenders who are sentenced to incarceration have several avenues to contest their conviction and incarceration. These opportunities include: 1) direct appeal, 2) application to the Sentence Review Division, 3) petition for postconviction relief, 4) a petition for a writ of habeas corpus, 5) parole, and 6) application for executive clemency.